

# Court of Appeals, State of Michigan

## ORDER

People of MI v Kwame Malik Kilpatrick

Docket No. 296559

LC No. 08-010496-01; 08-010777-01

Karen M. Fort Hood  
Presiding Judge

Kurtis T. Wilder

Christopher M. Murray  
Judges

---

The Court orders that the motion to file a supplement to the answer is DENIED.

After careful consideration of the legal pleadings and transcripts before this Court, the Court orders that the application for leave to appeal is DENIED for lack of merit in the grounds presented. In light of the testimony in the six restitution hearings, the trial court did not abuse its discretion in its restitution orders of January 20, 2010 and February 16, 2010. See *People v Gubachy*, 272 Mich App 706, 708; 728 NW2d 891 (2006).

Defendant alleged that the trial court's restitution order improperly included family assets as opposed to defendant's own financial resources, the 2008 joint income tax refund, the monies received from the Kilpatrick Civic Fund, and the \$240,000 loan provided for the family's transition. Restitution is mandatory pursuant to the Crime Victim's Rights Act, MCL 780.751 *et seq.*, and courts must order it in addition to any other penalty. *People v Ronowski*, 222 Mich App 58, 61; 564 NW2d 466 (1997). To determine the amount of restitution, the court shall consider the amount of the loss sustained, and the ability to pay is no longer the relevant inquiry. *Gubachy*, 272 Mich App at 711.

In the present case, defendant agreed to the amount of restitution, a condition of the plea agreement. Moreover, when ordering restitution, the trial court expressly included specific items that were to be forfeited to the city. Consequently, the trial court held that the failure to provide the income tax refund and the monies received from the civic fund constituted violations of the court's orders. In light of the trial court's orders and factual findings regarding these items, we cannot conclude that the trial court's decision regarding these items constituted an abuse of discretion. *Gubachy*, 272 Mich App 708. Defendant did not seek clarification from the trial court regarding any share of the income tax refund belonging to his wife and did not file a separate return on her behalf to avoid this issue.

The trial court did not abuse its discretion by concluding that the assets purportedly belonging to defendant's wife would be included in the determination regarding the proper amount of restitution payments. *Gubachy*, 272 Mich App 708. Defendant acknowledged that his wife and children did not have income, and all assets were turned over to his wife who was responsible for handling the family finances. When examining restitution, the trial court may examine diversion of funds to family members in an attempt to conceal assets. See *United States v Blanchard*, 9 F3d 22, 24-25 (CA 6, 1993). Defendant's argument to this effect was also previously rejected by a panel of this Court in one of defendant's prior appeals. *People v Kilpatrick*, unpublished order of the Court of Appeals, Dkt. No. 292273 (September 17, 2009). Finally, the trial court did not abuse its discretion by concluding that the \$240,000 transfer of the loan from defendant to his wife constituted a fraudulent conveyance. See MCL

566.34. At the time of the transfer, defendant was aware of the court's order regarding disclosure of all assets and gifts and knew of his outstanding obligation to pay restitution. *Gubachy*, 272 Mich App 708.

The case is remanded to the circuit court for further proceedings if deemed necessary. The stay of proceedings pursuant to this Court's order of February 25, 2010 is hereby VACATED.

The Court retains no further jurisdiction.

Fort Hood, J. concurs and states as follows: I would AFFIRM the trial court.<sup>1</sup>

Following six days of testimony in the lower court, the trial court modified the terms of defendant's restitution and ordered defendant to pay \$79,011 within thirty days and \$240,000 within ninety days. The crux of defendant's challenge in this application is that the trial court's restitution determination includes assets and benefits belonging to defendant's wife and children. This Court reviews a trial court's order of restitution for an abuse of discretion, *People v Bell*, 276 Mich App 342, 345; 741 NW2d 57 (2007), with the trial court's factual findings reviewed under the clearly erroneous standard. See *People v Oliver*, 464 Mich 184, 191; 627 NW2d 297 (2001). The appellate court must give deference to the trial court's superior position to evaluate the credibility of the witnesses and to the trial court's factual findings. *People v McPherson*, 263 Mich App 124, 136; 687 NW2d 370 (2004). The trial court's role in determining factual issues and issues of credibility must be respected. *People v Williams*, 470 Mich 634, 641; 683 NW2d 597 (2004).

In the present case, the trial court concluded that defendant did not offer candid testimony and was not credible in his conclusions that marital assets were separate and distinct. Therefore, the trial court held that a \$240,000 transfer between accounts was a fraudulent conveyance. Indeed, defendant provided conflicting testimony regarding his knowledge of his wife's income, gifts, and assets. Defendant testified that he did not know if his wife worked or had a source of income, but finally admitted on the third day of the restitution hearing that he provided the family's only source of income. Despite a court order that he produce documentation regarding his wife's assets and bank accounts, defendant admitted

---

<sup>1</sup> MCR 7.205(D)(2) addresses applications for leave to appeal and provides that this Court may deny or grant the application, *enter a final decision*, or grant other relief. In the trial court, there was a dispute surrounding a prior ruling by the trial court, and the import of an order from this Court denying the application for leave to appeal of that ruling for lack of merit in the grounds presented without any supporting analysis or rationale. *People v Kilpatrick*, unpublished order of the Court of Appeals, issued September 17, 2009, Docket No. 292273. Additionally, the prosecution has urged this Court to deny this application for leave to appeal, arguing that defendant has a claim of appeal as of right from the resolution of the probation violation hearing. Therefore, it is posited that the issues raised in this appeal could be raised at the conclusion of the probation violation hearing. However, because the underlying conviction arises from a guilty plea, defendant's appellate rights are limited to an application for leave to appeal. See MCR 6.445(H); MCR 7.203(A)(1)(b); MCR 7.202(6)(a)(v). To avoid further confusion in the lower court and to definitively resolve these issues, I would enter a final decision and affirm the trial court.

that he did not comply with the order and faulted his wife for failing to discuss the issue with him.<sup>2</sup> However, defendant did not seek to call his wife at the hearings to substantiate this assertion or seek court intervention to obtain her compliance. More importantly, despite defendant's assertion of spousal subterfuge, he continued to allow monetary transfers from his own account to his wife's account. By way of example, defendant asserted that a \$240,000 loan was issued for the purpose of caring for his family. However, the loan was not issued directly to defendant's wife and the last draft of the document provided that it was to assist defendant in his transition from public service to the private sector. Defendant had the money transferred to his wife's account. Finally, defendant admitted making monetary withdrawals to himself in amounts of \$20,000 and \$10,000, but could not document or recall how the withdrawals were expended. In light of the conflicting evidence regarding the ownership of assets and benefits and the trial court's determination regarding credibility, it cannot be concluded that the trial court clearly erred in its factual determination regarding assets and benefits to be included in the restitution determination. *Oliver*, 464 Mich at 191. Consequently, the trial court did not abuse its discretion regarding restitution, and I would affirm that holding. *Bell*, 276 Mich App at 345.

Next, defendant contends that the trial court abused its discretion by ordering restitution payments when defendant does not currently have the ability to pay. Defendant fails to acknowledge that the restitution order was issued pursuant to the Crime Victim's Rights Act, MCL 780.751 *et seq.* Under this Act, the trial court may revoke probation if the defendant fails to comply with a court order and fails to make a good faith effort to comply. MCL 780.766(11). The ability to pay analysis is examined in determining whether probation should be revoked or imprisonment imposed. *Id.* Previously, this statute allowed the court to consider the ability to pay when determining the amount of restitution, but the 1996 amendment eliminated that requirement. 1996 PA 562. Defendant's contention that ability to pay is a factor in the determination regarding the *amount* of the restitution payment is without merit. Rather, at the probation violation hearings, defendant can raise the issue of ability to pay. MCL 780.766(11). Therefore, the trial court's decision regarding the amount of restitution did not constitute an abuse of discretion because it is a separate and distinct analysis from the ability to pay. I would affirm the ruling of the trial court.

---

<sup>2</sup> Initially, defendant asserted the marital privilege to avoid answering questions. After the trial court noted that disclosure of the wife's assets was required by court order and contempt could result from the failure to abide by the court's order, defendant testified that he broached the subject with his wife, but she still refused to engage in a discussion or aid in any disclosure of any separate and distinct assets.



A true copy entered and certified by Sandra Schultz Mengel, Chief Clerk, on

MAR 05 2010

Date

*Sandra Schultz Mengel*  
Chief Clerk